Filed 2/5/03

CERTIFIED FOR PARTIAL PUBLICATION*

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

SOUTHGATE RECREATION AND PARK DISTRICT, Plaintiff and Appellant, v. CALIFORNIA ASSOCIATION FOR PARK AND RECREATION INSURANCE, Defendant and Respondent.	C038416 C039249 (Super. Ct. No. 00AS00048)

APPEAL from a judgment of the Superior Court of Sacramento County, Joe S. Gray, Judge. Affirmed in part and reversed in part.

McCormick, Barstow, Sheppard, Wayte & Carruth, James P. Wagoner, Patrick Fredette and Jared D. Beeson for Plaintiff and Appellant.

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 3 and 4 of the Discussion in the majority opinion and the concurring and dissenting opinions that address the court's award of attorney fees.

Kronick, Moskovitz, Tiedemann & Girard, Robin Leslie Stewart and Thomas W. Barth for Defendant and Respondent.

Southgate Recreation and Park District (Southgate) appeals from a summary judgment and from a postjudgment order of attorney fees in favor of California Association for Park and Recreation Insurance (CAPRI). CAPRI is a joint powers authority that administers a liability risk-pooling arrangement on behalf of its approximately 60 park and recreation member districts. We consolidated the two appeals.

The trial court found that CAPRI did not have to defend or indemnify Southgate against lawsuits filed by unpaid subcontractors on the Wildhawk Golf Course construction project undertaken by Southgate. We agree and shall affirm the judgment in the published parts of our opinion.

In the unpublished portions of our opinion we conclude the trial court did not err in denying Southgate's request to continue the summary judgment hearing. Additionally, for separate reasons, Justice Blease and I hold that the trial court did err in awarding CAPRI its attorney fees. Consequently, we shall reverse the attorney fee order. Justice Morrison would affirm the award of attorney fees.

BACKGROUND

In June 1996, Southgate contracted with Flint Construction (Flint), a general contractor, to build the Wildhawk Golf Course. Before completing the project, Flint went bankrupt. To make matters worse, the sureties on the performance and payment

bonds defaulted. Various unpaid subcontractors (the subcontractors) then sued Southgate and its directors, seeking payment for the goods and services they had provided on the project.

Southgate in turn sued CAPRI for damages and declaratory relief, seeking defense and indemnity of the subcontractor suits. CAPRI is a joint powers authority that administers a liability risk-pooling arrangement on behalf of its approximately 60 park and recreation member districts, including Southgate; as a joint powers authority, CAPRI is a separate public entity. (Gov. Code, § 6500 et seq., 990.8; see *Orange County Water Dist. v. Association of Cal. Water etc. Authority* (1997) 54 Cal.App.4th 772, 774-775, 777-778 (*Orange County*).) CAPRI's basic purposes are to have its members pool self-insured losses, jointly purchase excess insurance, and share administrative and other claims-related services. (See *Orange County, supra,* 54 Cal.App.4th at pp. 774-775.) CAPRI operates under the terms of a joint powers agreement and an annually renewed memorandum of coverage.

CAPRI moved successfully for summary judgment, contending it had no duty to defend or indemnify Southgate on the underlying subcontractor claims.

On appeal, Southgate contends (1) CAPRI has a duty to defend Southgate based on the "personal injury" offense of "violation of property rights" contained in the 1997-1998 memorandum of coverage; (2) an exclusion for liability "arising out of or related to" construction contracts does not apply

because the subcontractors allege noncontractual claims and there were no construction contracts between Southgate and the subcontractors; (3) the trial court abused its discretion in not continuing CAPRI's summary judgment motion to allow Southgate to depose David McMurchie (who was CAPRI's general counsel and Southgate's defense counsel); and (4) the trial court erred in awarding attorney fees to CAPRI on judicial estoppel grounds.

Before discussing these issues, we must set forth some general principles that will guide our discussion.

Because joint authority risk pools are ultimately member created and directed, they are not considered insurance in a conventional sense; they are an alternative to commercial insurance. (*City of South El Monte v. Southern Cal. Joint Powers Ins. Authority* (1995) 38 Cal.App.4th 1629, 1633-1634, 1639-1640 (*South El Monte*); *Orange County, supra,* 54 Cal.App.4th at pp. 774-775, 777-778; Gov. Code, § 990.8, subd. (c).) In recognition of this, questions of defense and coverage are answered by relying on rules of contract law that emphasize the parties' intent. (*South El Monte, supra,* 38 Cal.App.4th at pp. 1639, 1640.) The basic rule of contract interpretation is to effectuate the parties' intent as expressed in the contract's terms, which are given their common meaning. (*Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 126 (*Century Transit*); Civ. Code, §§ 1636, 1638, 1639, 1644.) "Moreover, the *context* in which a term appears is critical." (*Century Transit, supra,* 42 Cal.App.4th at p. 126; see Civ. Code, § 1641.) Contractual language must be

construed in the context of the contract as a whole, and in the circumstances of the case. (*Ibid.*)

If the summary judgment papers establish there is no material issue of fact to be tried, summary judgment is properly granted. (Code Civ. Proc., § 437c, subd. (c).) We review those papers independently. (See *South El Monte, supra,* 38 Cal.App.4th at p. 1645.)

DISCUSSION

1. *Duty to Defend Based on Coverage for Personal Injury Offense of Violation of Property Rights*

Southgate contends that CAPRI has a duty to defend the subcontractor lawsuits against Southgate based on the "personal injury" offense of "violation of property rights" contained in the 1997-1998 memorandum of coverage. We disagree.

Two memorandums of coverage are at issue here, one covering the April 1996-1997 period, the other April 1997-1998.

The 1996-1997 memorandum of coverage is comprised of two parts, coverage part A--public entity liability, and coverage part B--public officials liability. This memorandum generally covers a member district for all sums it is "legally obligated to pay as damages because of personal injury or property damage or public officials errors and omissions liability, to which the coverage applies caused by an occurrence." Coverage part A for public entity liability covers certain defined injuries or damage: "'bodily injury,' 'personal injury,' 'advertising injury,' or 'property damage' . . . ." "Personal injury" is defined as follows: "Personal injury means

injury, other than bodily injury, arising out of one or more of the following offenses: [¶] a. False arrest, detention or imprisonment; [¶] b. Malicious prosecution; [¶] c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises . . . ; [¶] d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or [¶] e. Oral or written publication of material that violate[s] a person's right of privacy. [¶] Personal injury also includes the following offenses, but only with respect to the Law Enforcement Activities of the Named Insured or [its] departmentally approved Law Enforcement Activities for others: [¶] f. Assault and battery; or [¶] g. Violation of civil rights; or h. [¶] *Violation of property rights.* [¶] i. Erroneous service of process." (Italics added.)

As for the 1997-1998 memorandum of coverage, CAPRI, for the first time, drafted its own coverage form rather than incorporating the form of an outside insurer. The 1997-1998 memorandum is similar to the 1996-1997 memorandum, with coverage A encompassing personal injury and property damage, and coverage B encompassing public officials and employee liability. "Personal injury" in the 1997-1998 memorandum is defined nearly identically to the 1996-1997 memorandum; however, subdivisions "f" through "i," including subdivision "h" (violation of property rights), are not prefaced by the law

enforcement limitation found in the 1996-1997 memorandum (and subdivision "g" explicitly includes discrimination claims).

As Southgate concedes, all of the subcontractors' claims against it arise from the "same nucleus of common facts"--the subcontractors want Southgate to pay for the goods and services they provided at the Wildhawk construction project. The subcontractors' claims are based on various theories. They allege that: Southgate breached a contract with them (Southgate allegedly took over the project after Flint went bankrupt); they are third party beneficiaries of the Southgate-Flint contract; Southgate failed to ensure the adequacy of the surety performance and payment bonds; and Southgate improperly administered or failed to retain the construction funds to pay the subcontractors (this contention spawned several legal theories including conversion, negligent administration of trust proceeds, and violation of stop notice; the stop notice law for public works, Civil Code section 3179 et seq., provides an alternative to a mechanic's lien and allows a subcontractor or supplier to make a claim against the public entity project owner for a portion of the undisbursed construction proceeds).

Focusing on the conversion, breach of trust and stop notice claims of the subcontractors, Southgate argues that CAPRI has a duty to defend the subcontractors' suits under the "personal injury" offense of "violation of property rights" contained in the 1997-1998 memorandum of coverage. Southgate looks to the legal dictionary definition of "property right," defined as a "generic term which refers to any type of right to specific

property whether it is personal or real property, tangible or intangible." (Black's Law Dict. (6th ed. 1990) p. 1218.) As Southgate argues, the very nature of a conversion claim rests on a purported violation of a property interest. Likewise, there must be property for there to be a trust. And a stop notice claim triggers an immediate right against the earnings of the contractor held by the project owner.

Southgate's argument fails on two grounds. First, the subcontractors allege in common that Southgate is obligated to pay for their goods and services at the Wildhawk construction project. This obligation centers on Southgate's alleged contractual failings and improper administration of the Flint construction contract funds on behalf of the subcontractors. However, the 1997-1998 memorandum of coverage excludes from personal injury coverage a "[f]ailure to perform or breach of a contractual obligation."

Second, Southgate looks to the legal definition of "property right" as providing the legal foundation for its argument. But the 1997-1998 memorandum of coverage includes a violation of "property rights" only under its "personal injury" section. The same legal dictionary that Southgate uses to define "property right" defines "personal injury" (aside from bodily injury) as "[a]ny invasion of a personal right, including mental suffering and false imprisonment." (Black's Law Dict. (7th ed. 1999) p. 790.) In line with this definition, the 1997-1998 memorandum of coverage defines "personal injury" as "injury, other than bodily injury, arising out of one or

more of the following offenses": false arrest, detention or imprisonment; malicious prosecution; wrongful eviction or entry or invasion of private occupancy; slander; libel; violation of privacy; assault and battery; violation of civil rights or claims of discrimination; *violation of property rights*; or erroneous service of process. It is in this context of classically personal interests that "violation of property rights" must be read. As noted, in contractual interpretation, "the *context* in which a term appears is critical." (*Century Transit, supra,* 42 Cal.App.4th at p. 126.) (Admittedly, slander and libel under the "personal injury" definition in the memorandums cover persons *and* organizations. But this is the only mention of an organization in the "personal injury" offenses, and slander and libel still typify a classically personal interest (reputation).) Furthermore, Southgate is left with only the 1997-1998 memorandum of coverage because the "violation of property rights" in the 1996-1997 memorandum is expressly limited to law enforcement activity.

We conclude that CAPRI does not have a duty to defend Southgate on the subcontractors' lawsuits under the "personal injury" offense of "violation of property rights." As we shall see, this conclusion is only bolstered when we turn to examine a critical exclusion in the memorandums of coverage.

2. *Exclusion for Liability Arising out of or Related to Construction Contract*

Under the public official and employee liability portion of the two memorandums of coverage (titled coverage part B in

the 1996-1997 memorandum; coverage B in the 1997-1998), a member district is generally covered for damages that it becomes legally obligated to pay because of a wrongful act. A "wrongful act" means any actual or alleged error or misstatement or misleading statement, act or omission, neglect, or negligence, including misfeasance and nonfeasance, by the district, its employees or officials in the discharge of duties.

Excluded from this coverage is any liability "[a]rising out of or related to construction . . . contracts or to any other contract for the purchase of goods or services."

Southgate argues that the subcontractors' underlying claims for conversion, breach of trust, and violation of stop notice are not based on the construction contract for the Wildhawk Golf Course; rather, these claims are based on Southgate's alleged negligence and alleged violation of a statutory duty to verify Flint's surety bonds.

The term "'[a]rising out of' is a broad concept requiring only a 'slight connection' or an 'incidental relationship' between the injury and the excluded risk. [Citation.] Such language 'requires [the court] to examine the conduct underlying the . . . lawsuit, instead of the legal theories attached to the conduct." (*Century Transit, supra,* 42 Cal.App.4th at p. 127, fn. 4; see also *Continental Cas. Co. v. City of Richmond* (9th. Cir. 1985) 763 F.2d 1076, 1080-1081 [cited by *Century Transit*]; see *Charles E. Thomas Co. v. Transamerica Ins. Group* (1998) 62 Cal.App.4th 379, 383-384 (*Thomas*).) As this court has noted, the "'arising out of' connective . . . broadly links"

the exclusionary operative events with the exclusion. (*State Farm Fire & Casualty Co. v. Salas* (1990) 222 Cal.App.3d 268, 274, fn. 4.) This court has also generally equated "arising out of" with "origination, growth or flow from the event." (*Pacific Indem. Co. v. Truck Ins. Exch.* (1969) 270 Cal.App.2d 700, 704.) Nonetheless, an exclusionary clause must still be conspicuous, plain and clear to be enforceable. (*DeMay v. Interinsurance Exchange* (1995) 32 Cal.App.4th 1133, 1137.)

As noted, the subcontractors' claims against Southgate for conversion, breach of trust, and violation of stop notice are based on Southgate's alleged negligent or improper administration of the Flint construction contract funds on behalf of the subcontractors. These claims, then, arise out of or are related to a construction contract. They fit comfortably within the construction contract exclusion.

The fact the subcontractors have alleged noncontractual theories that Southgate acted negligently with respect to the construction funds or breached statutory duties regarding the adequacy of the surety bonds changes nothing. It is not the underlying claims' legal theories that control coverage and exclusions--it is their facts. (*Century Transit, supra,* 42 Cal.App.4th at p. 127, fn. 4; *Thomas, supra,* 62 Cal.App.4th at p. 384.)

Century Transit provides a good example of this principle. There, a company, Century Transit, was sued for negligently hiring an employee who committed an assault and battery. The insurance policy excluded coverage for any claim "based on"

assault and battery. To avoid this exclusion, Century Transit argued that since the underlying complaint alleged negligent hiring, the complaint was based on negligence rather than on assault and battery. The *Century Transit* court rejected this argument because the alleged negligence was based on the assault and battery. (*Century Transit, supra,* 42 Cal.App.4th at pp. 123-125, 127-128.)

Similarly, here, Southgate's alleged negligence and breach of statutory duties arise out of or are related to the Southgate-Flint construction contract. It is Southgate's failure to retain funds under that very contract and Southgate's failure to ensure an adequate payment bond for that very contract that comprise the basis of the subcontractor lawsuits against Southgate for conversion, breach of trust, and violation of stop notice. The construction contract exclusion applies. This linkage between the Southgate-Flint construction contract and Southgate's alleged failings regarding the subcontractors, coupled with the "arising out of" language of the construction contract exclusion, defeats Southgate's argument that this exclusion applies only if there were direct construction contracts between Southgate and the subcontractors.

The decision in *Thomas, supra,* 62 Cal.App.4th 379, relied upon by Southgate, is consistent with our analysis. As the *Thomas* court emphasized, the exclusion there excluded only losses "'*arising out of any . . . request, demand or order.*" (*Id.* at p. 383.) The *Thomas* analysis hinged on whether a loss arose from a request, demand or order. Similarly,

the exclusionary analysis here hinges on whether the claimed losses arose from a construction contract.

In the end, we agree with the following comment from the trial court: "Interpreting [the two] Memoranda as a whole, it is clear that the self-insurance pool members did not intend, under any reasonable interpretation, to act as a guarantor for unpaid contractual obligations for labor, materials and/or equipment provided to the Wildhawk construction project."

3. *Denial of Request for Continuance*

Southgate contends the trial court abused its discretion in denying Southgate's request to continue CAPRI's summary judgment motion so Southgate could depose David McMurchie. (Code Civ. Proc., § 437c, subd. (h) (hereafter, section 437c(h)); see *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 324-326 (*Scott*).) We disagree. McMurchie helped draft the memorandums of coverage as CAPRI's general and coverage counsel, and became Southgate's defense counsel.

Under section 437c(h), the party seeking a continuance must submit a declaration that informs the court of outstanding discovery that is essential to resist the summary judgment motion. (Code Civ. Proc., § 437c(h); *Scott, supra,* 38 Cal.App.4th at pp. 325-326.) Southgate failed to comply with this requirement. The declaration it submitted, through its attorney Patrick Fredette, simply stated on this point that attorney Fredette "was under the belief David McMurchie, CAPRI's former counsel and defense counsel for Southgate in

the underlying matters, would execute a declaration setting forth essential facts that would support Southgate's opposition to CAPRI's instant motion for summary judgment. However, . . . Mr. McMurchie just recently refused to execute a declaration in this matter . . . . In order to oppose CAPRI's instant motion, it is imperative that Southgate have the opportunity to take Mr. McMurchie's deposition, as it is believed by Southgate that Mr. McMurchie has factual information that is not privileged and which is essential to support its opposition."

Attorney Fredette's declaration fails to set forth any essential facts sought to be obtained through McMurchie's deposition. Southgate's opposition points and authorities are more specific. They note the removal of the law enforcement restriction from the personal injury-property rights coverage; the construction contract exclusion as applying only to direct contracts between a member district and a claimant; and the extent to which CAPRI's member districts helped draft the memorandums of coverage. The problem is that points and authorities are not a declaration.

Aside from this procedural deficiency, there is a substantive dilemma surrounding McMurchie. McMurchie was CAPRI's general and coverage counsel and helped draft the memorandums of coverage. So far, so good. However, he also represented Southgate on the subcontractors' lawsuits and tendered Southgate's defense to CAPRI *while he was still CAPRI's counsel*. Southgate says this made McMurchie the "'man of the hour'" and gave him a "rather unique perspective." If McMurchie

was the "man of the hour," it looks as if he was double-billing for that time; he is not allowed to use his unique perspective to help one client at the expense of another absent a fully informed waiver, which, not surprisingly, he was unable to obtain. (Rules Prof. Conduct, rule 3-310(C)(2).) The weight of the many hats McMurchie was wearing may explain why he declined when he was asked to submit a declaration on Southgate's behalf.

We conclude the trial court did not abuse its discretion in denying Southgate's request for a continuance to obtain McMurchie's deposition.

4. *Award of Attorney Fees*

Southgate contends the trial court erred in awarding CAPRI nearly $98,000 in attorney fees in a postjudgment order. Justice Blease and I agree for different reasons and reverse this order.

CAPRI moved for attorney fees under Civil Code section 1717 (section 1717) as a prevailing party in a contractual action with a fee provision. (See also Code Civ. Proc., § 1033.5, subd. (a)(10)(A); Cal. Rules of Court, rule 870.2.) CAPRI looked to the attorney fee provision in the joint powers agreement, and claimed the memorandums of coverage incorporated this provision. The trial court awarded CAPRI its attorney fees under the section 1717-based judicial estoppel theory set forth in our decision in *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175 (*International Billing*).

Section 1717 allows the prevailing party in a contractual action with a contractual fee provision to obtain its attorney fees. The section also avoids the unfairness of one-sided attorney fee provisions in contracts by providing that if a contract gives one party the right to recover attorney fees in a contractual action, the other party, upon prevailing, is entitled to fees. (*International Billing, supra,* 84 Cal.App.4th at p. 1182.) In *International Billing*, this court concluded that a litigant--who requests attorney fees in a contractual action based on a contractual fee provision under section 1717--is judicially estopped from denying that the contract contains that provision if he loses the case. (*Id.* at pp. 1186-1192.) We said: "The purposes of section 1717 are thwarted when a party is able to use the threat of fees as a club, and seek to avoid liability for fees later." (*Id.* at p. 1186.) "Where a party claims a contract allows fees and prevails, it gets fees. Where it claims a contract allows fees and loses, it must pay fees." (*Id.* at p. 1190.) We emphasized, however, that this rule of judicial estoppel applies "only where a party brings a breach of contract action and the contract contains some provision which the party asserts operates as a fees provision." (*Id.* at p. 1187.)

In awarding CAPRI its attorney fees under *International Billing*'s judicial estoppel theory, the trial court relied on three factors. The court noted that Southgate had requested attorney fees due to alleged breaches of the memorandums of coverage; noted that Southgate had requested attorney fees in

the prayer of its complaint; and pointed to Southgate's response to an interrogatory from CAPRI. In the interrogatory response, Southgate stated it was basing its attorney fee request on CAPRI's knowledge of the nature of the litigation and governing law, the relevant memorandums of coverage and, but not limited to, the joint powers agreement.

In the body of its complaint, Southgate alleged that CAPRI breached the memorandums of coverage by refusing to defend and indemnify Southgate against the underlying subcontractor lawsuits. As a consequence, Southgate alleged, it defended itself and incurred attorney fees in doing so. "Such breach," Southgate asserted, was "unreasonable and in violation of the covenant of good faith and fair dealing impliedly contained [in the memorandums of coverage] and thus an award of attorneys' fees in this action is appropriate."

In the prayer of its complaint, Southgate prayed for "damages consisting of attorneys' fees . . . incurred up through the filing of this complaint and up through the time of trial in the defense of Southgate . . . in the [underlying subcontractor] actions." Southgate also prayed for "costs and attorneys' fees herein incurred."

The memorandums of coverage do not contain an attorney fee provision. The coverage they provide is "subject to all the terms and conditions of . . . the joint powers agreement . . . ."

The joint powers agreement does contain an attorney fee provision. It states: "CAPRI is hereby granted authority to

enforce this agreement. In the event action is instituted to enforce any term of this agreement or any term of the bylaws against any district which signed this agreement, the district agrees to pay such sums as the Court may fix as attorney fees and costs in said action."

In awarding contractual-based *International Billing* attorney fees to CAPRI, the trial court looked to the attorney fee provision of the joint powers agreement and the interplay between that agreement and the memorandums of coverage. As I shall explain, I need not resolve how, or if, the attorney fee provision of the joint powers agreement applies to the memorandums of coverage. This is because the contractual-based judicial estoppel theory of *International Billing* does not apply here--the present action sounds in tort.

In requesting its attorney fees, Southgate did not rely on a contractual fee provision and then deny the existence of that provision when CAPRI prevailed. As Southgate made clear to the trial court, it sought attorney fees on a tort basis rather than a contractual one. When an insurer's tortious conduct in breaching the covenant of good faith and fair dealing compels the insured to hire an attorney to defend against lawsuits that the insurer was required to defend under the insurance policy, the insurer is liable in a tort action for those attorney fees as an element of tort damages. The attorney fees are an economic loss--damages--proximately caused by the tort. (See *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817; *California*

Fair Plan Assn. v. Politi (1990) 220 Cal.App.3d 1612, 1617-1618.)

Southgate sued CAPRI for refusing to defend and indemnify Southgate against the underlying subcontractor actions. Southgate alleged in the body of its complaint that CAPRI had unreasonably breached the memorandums of coverage and violated the covenant of good faith and fair dealing by failing to defend Southgate, and on this basis Southgate was seeking the attorney fees it had incurred in defending the subcontractor actions. Southgate reiterated this request in its prayer, calling these attorney fees "damages." In answering Southgate's complaint, CAPRI denied that Southgate was "entitled to an award of attorney fees in this matter, either on a breach of implied covenant theory, or based on any other legal theory." These allegations and legal principles are what Southgate was referring to when it responded "CAPRI's knowledge of the nature of the litigation and governing law" as one of the bases for its request for attorney fees in its interrogatory response. Furthermore, Southgate maintained that it had referred to the joint powers agreement in its interrogatory response only to show CAPRI's insurer-like status. The joint powers agreement does say that its purpose is to "jointly fund and develop programs to provide various insurance coverages for participating member districts." Admittedly, Southgate also prayed in its complaint against CAPRI for "attorneys' fees herein incurred." This boilerplate request, however, does not specify a contractual basis; the only specific request

that Southgate has made for attorney fees is based on CAPRI's alleged tortious breach of the covenant of good faith and fair dealing.

It is also true that CAPRI is not technically an insurer. Rather, it is a joint powers authority that develops and administers a risk-pooling arrangement and defends and indemnifies member districts against covered claims. (*Orange County, supra,* 54 Cal.App.4th 772; *South El Monte, supra,* 38 Cal.App.4th 1629.) There is no need to decide whether Southgate can legally obtain attorney fees from CAPRI as tort damages for breaching the covenant of good faith and fair dealing. I need only note that CAPRI is similar enough to an insurer to show that Southgate was requesting attorney fees on this basis rather than on a contractual basis (in this lawsuit seeking defense and indemnification); this defeats the contractual-based judicial estoppel theory for an award of attorney fees against Southgate. (*International Billing, supra,* 84 Cal.App.4th at p. 1187.)

There is no remaining basis on which to sustain CAPRI's attorney fee award. An insurer may not recover attorney fees as tort damages for breach of the covenant of good faith and fair dealing. (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400, 402; *California Fair Plan Assn. v. Politi, supra,* 220 Cal.App.3d at p. 1618.) Thus, judicial estoppel cannot be theoretically invoked in CAPRI's favor in this context. And, the action here is based in tort rather than in contract so section 1717 does not apply.

DISPOSITION

The judgment is affirmed. The order awarding attorney fees to CAPRI is reversed. CAPRI's request for attorney fees on appeal is denied. Each party shall pay its own costs on appeal.

(*CERTIFIED FOR PARTIAL PUBLICATION*.)

DAVIS, J.

I concur in the judgment and in the opinion, except that I write separately on the ground for denial of attorney fees.

The case is here on appeal from the granting of a summary judgment and attorney fees to CAPRI in Southgate's action against it. The attorney fees were awarded under Civil Code section 1717, which awards a prevailing party attorney fees if the action is predicated upon a contract which contains an attorney fee provision, pursuant to *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175.

Southgate, a recreation and park district, sued CAPRI, a joint powers authority which administers a risk pooling agreement, for refusal to defend and indemnify it against lawsuits filed by subcontractors of a golf course which Southgate was building. The risk pooling agreement does not contain an attorney fee provision.

The Southgate complaint is expressly based upon a "Memorandum of Coverage" between Southgate and CAPRI. Southgate asks for a declaration that "CAPRI's Memorandums of Coverage . . . obligate CAPRI to defend and indemnify SOUTHGATE" in the underlying actions by the subcontractors against Southgate. The complaint also contains a request for attorney fees but that is of no consequence.

The estoppel argument in *International Billing Services* has no application to this case. It says: "We emphasize the following discussion applies only where a party brings a breach of contract action and the contract contains some provision which the party asserts operates as a fees provision." (84

Cal.App.4th at p. 1187; see also *Perry v. Robertson* (1988) 201 Cal.App.3d 333.) In *International* there was such a provision which said there was a duty to "'reimburse . . . for any legal fees,'" and the plaintiff asserted this as the ground for a request for attorney fees. (*Id.* at p. 1185.)

There is no claim of an attorney fee provision in the Memorandum of Coverage at issue in this case. The fact that Southgate claimed attorney fees in the complaint is neither here nor there. Without a basis in the language of the agreement upon which the complaint is based the claim goes nowhere. An estoppel cannot be created out of thin air.

For these reasons I agree that attorney fees should be denied.

BLEASE, Acting P. J.

Morrison, J.

I concur except for the decision to deny respondent an award of attorney fees. To that holding I dissent.

This meritless action by Southgate Recreation and Park District (Southgate) cost CAPRI about $98,000 in the trial court, and with the appeal its fees and costs will exceed $100,000. The trial court granted CAPRI attorney fees by applying judicial estoppel in line with our decision in *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175 (*IBS*). I agree with the trial court.

The trial court ruled as follows:

> "In its complaint, [Southgate] requested attorneys' fees and costs due to an alleged breach of the Memoranda of Coverage. It also requested attorneys' fees and costs in its prayer for relief. In responding to interrogatories propounded by CAPRI, Southgate contended CAPRI '. . . can be held legally liable to you (Southgate) for your attorneys' fees incurred in pursuing this lawsuit against CAPRI'. In response to interrogatories seeking the facts and documents in support of this contention, Southgate referred to the '. . . relevant memorandums of coverage, . . . governing law and, but not limited to, the [JPA].' [Citation.] In response to this motion, Southgate argues the memorandums of coverage do not contain a fee provision; although there is a fee provision in the [JPA], this action is not a dispute involving the JPA; the attorneys' fee provision in the JPA is limited to circumstances unrelated to the insurance coverage disputes arising out of the coverage memorandums and, finally, even if the Court were to construe the JPA and the memorandums of coverage as one contract, the intent

> of the parties demonstrates the fee provision is not applicable to the present dispute.
>
> "Southgate is estopped from arguing it does not have to pay attorneys' fees. It may be true that Southgate, although asking for its attorneys' fees, may not have been entitled to them. However, that is not the point. 'If a party to a contract can claim a right to recover attorney's fees pursuant to a provision in a contract and then deny the effect and application of that provision if his opponent prevails, section 1717's purposes would be thwarted and attorney's fees claims could be used as instruments of oppression.' [Quoting *IBS*, *supra*, 84 Cal.App.4th at p. [1188].] A provision does not have to be found that provides for the fees. 'Where a party claims a contract allows fees and prevails, it gets fees. Where it claims a contract allows fees and loses, it must pay fees.' [Quoting IBS, supra, 84 Cal.App.4th at p. 1190.] As noted above, Southgate asked for attorneys' fees and indicated the request was supported by the memorandums of coverage and the JPA. It is therefore estopped from arguing CAPRI is not entitled to its attorneys' fees."

"To avoid the perceived unfairness of one-sided attorney fee provisions, . . . [Civil Code section 1717 provides] if a contract gives one party the right to recover attorney fees in an action arising out of the contract, the other party, upon prevailing, is entitled to fees." (*IBS*, *supra*, 84 Cal.App.4th at p. 1182.) When a party claims fees based on a contractual provision, that party cannot thereafter claim the provision does not provide for fees. The very request for fees alters the litigation stakes. (See *id.* at pp. 1186-1192.)

I agree that judicial estoppel does not apply where a party simply includes a boilerplate request for fees in a complaint,

but "applies only where a party brings a breach of contract action and the contract contains some provision which the party asserts operates as a fees provision." (*IBS*, *supra*, 84 Cal.App.4th at p. 1187.) A trial court must ask, would the losing party have obtained fees if it won on the merits and if its interpretation of the claimed fees provision was correct? If so, it is unfair to deny fees. (See *id.* at pp. 1187-1189.)

My colleagues suggest two reasons for not applying judicial estoppel in this case. I disagree with each.

First, the majority states that Southgate framed its case by alleging tortious breach of the covenant of good faith and fair dealing. But the gist of Southgate's action was that CAPRI breached its quasi-insurance contract, thereby committing a tort. We should not stop at the tort label employed by Southgate. Because Southgate could, if successful, have obtained damages under tort or contract, Southgate would not have been required to elect its remedy before requesting fees. Southgate's allegations "while compacted in a single count, [were] adequate to tender both the tort and contract claims for relief." (*Perry v. Robertson* (1988) 201 Cal.App.3d 333, 340-341; see *IBS*, *supra*, 84 Cal.App.4th at p. 1185.)

Second, the majority states that the alleged fee provision is not in the memorandum of coverage, but only in an incorporated Joint Powers Agreement (JPA). This misses the

point of *IBS*. Southgate found a fees provision connected to the dispute and claimed it would provide for fees if it won. Southgate linked the JPA to the memorandum of coverage in its effort to lay the groundwork for a fee award. Now that it has lost, it claims the JPA fees provision does not provide for fees in this case. That is playing "fast and loose" with the courts. (See *IBS*, *supra*, 84 Cal.App.4th at pp. 1190-1191.) It does not matter that Southgate was *wrong* about the JPA provision. "The *point* of an estoppel is to prevent a party from litigating an issue: Estoppel is not dependent on the potential merits of a claim but depends on the manner in which a claim is raised or not raised." (*Id*. at p. 1189, original italics.) It is not necessary that "a provision must be found to provide for fees; rather, a party's legal theory (breach of a contract containing a fees provision) must encompass fees. Where a party claims a contract allows fees and prevails, it gets fees. Where it claims a contract allows fees and loses, it must pay fees." (*Id*. at p. 1190.)

Southgate claims *IBS, supra,* 84 Cal.App.4th 1175 should not apply "retroactively" and that CAPRI did not adequately raise judicial estoppel. Southgate briefed and argued the *IBS* issue in the trial court, therefore it had notice and an opportunity to be heard. There is no basis to conclude the *IBS* decision

impaired vested expectations or otherwise should not apply to cases filed before it became final.

I respectfully dissent from the majority opinion to the extent it reverses the fee award.

_____MORRISON_____, J.